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CITATIONS

745856—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1373

OSCAR K. SMITH, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Maryland (R. 2–20) is reported at 66 F. Supp. 933. The *per curiam* opinion of the Circuit Court of Appeals for the Fourth Circuit (R. 128), adopting the District Court's opinion, is reported at 159 F. 2d 247.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 30, 1947 (R. 129). The time for filing a petition for a writ of certiorari was extended to and including May 15, 1947

(R. 131), and the petition was filed May 15, 1947. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the slop chest statute (46 U. S. C. 670) imposes absolute liability upon the owner of a vessel for the consequences of failing to supply, from the chest, rubber boots which would fit a particular seaman, where the owner exercised reasonable and customary care in outfitting the chest with an assortment of rubber boots.

2. If so, whether petitioner's contributory negligence in failing to take steps to prevent disability consequent upon the respondent's failure to supply rubber boots bars him from recovering damages.

3. Whether petitioner's disability was proximately caused by the respondent's alleged breach of obligation under the slop chest statute.

STATUTE INVOLVED

The pertinent statutory provision concerning slop chests (Section 11 of the Act of June 26, 1884, c. 121, 23 Stat. 56, 46 U. S. C. 670) is as follows:

> * * * every vessel mentioned in [section 666 of Title 46] shall also be provided with a slop chest, which shall contain

> a complement of clothing for the intended voyage for each seaman employed, including boots or shoes, hats or caps, underclothing and outer clothing, oiled clothing, and everything necessary for the wear of a seaman; also a full supply of tobacco and blankets. Any of the contents of the slop chest shall be sold, from time to time, to any or every seaman applying therefor, for his own use, at a profit not exceeding 10 per centum of the reasonable wholesale value of the same at the port at which the voyage commenced. And if any such vessel is not provided, before sailing, as herein required, the owner shall be liable to a penalty of not more than $500. The provisions of this section shall not apply to vessels plying between the United States and the Dominion of Canada, Newfoundland, the Bermuda Islands, the Bahama Islands, the West Indies, Mexico, and Central America. * * *

STATEMENT

Petitioner's action is brought against the United States, under the Suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. 525, 46 U. S. C. 741–752) and the Jones Act (Act of March 4, 1915, c. 153, Sec. 20, 38 Stat. 1185, as amended, 46 U. S. C. 688), for damages for disease asserted to have resulted from alleged failure to comply with the slop chest statute, *supra*, pp. 2–3, aboard a Liberty ship owned by the United

States and operated by the War Shipping Administration (R. 2–3). The case was tried, without a jury, by the District Judge, who made findings of fact which were adopted by the Circuit Court of Appeals (R. 4–7, 13–16, 128).

Petitioner was employed as Acting Chief Mate aboard the S. S. *Milton J. Foreman* on her maiden voyage, in November and December 1944, from Savannah, Georgia, to Liverpool, England, and returning to New York. He was hired in October in Baltimore, and proceeded to Savannah to await the ship's sailing in the middle of November (R. 2, 4). He brought the customary clothing aboard, except for rubber boots and other rough weather gear which he claims he expected to purchase, if necessary, from the slop chest (R. 5, 25–27, 38). Almost immediately after sailing, the vessel ran into heavy weather which continued throughout the eastward crossing (R. 4–5). Petitioner, a large man six feet four inches tall and weighing about 200 pounds (R. 5), who testified that he normally wore size 11 (R. 28, 108), sought to purchase a pair of rubber boots from the slop chest, but was unable to find a pair which would fit him in the chest's assortment of twelve pairs (R. 5).

The War Shipping Administration's Operations Regulations No. 13, dated October 7, 1942, required the Administration's General Agents to "provide a slop chest for the benefit of seamen

aboard each vessel as soon as it enters service. The Master shall submit to the General Agent a requisition for the items required for the general voyage and the General Agent shall purchase same for account of the War Shipping Administration. * * *. It shall be the responsibility of each General Agent and Master to exercise reasonable care and diligence in the compliance with the owner's obligation herein and in protection and disposition of the contents of the slop chests" (R. 5–6). In this case, the General Agent's customary routine with respect to providing slop chests was followed. A list of some 60 different items (*e. g.*, caps, coats, drawers, brushes, cigars, pipes, tobacco, chewing gum, playing cards) was drawn up, with the number of each item specified (R. 6).[1] Twelve pairs of

[1] The slop chest requisition was dated October 18, 1944, signed by the petitioner, and approved by the Master as well as by the General Agent's port captain (R. 6, 114). Petitioner testified that he probably signed the document, as a formality, when the supplies were delivered aboard ship, and that he had nothing earlier to do with the order (R. 112–116); and he argues, in his petition (Pet. 38), that he could not have signed it on October 18 since he was not hired, in Baltimore, until a few days thereafter. There was testimony, however, by the port captain that the list was submitted to the Master and the officers for their inspection and approval before it was filled (R. 87–89, 93), and the District Court apparently concluded that petitioner actually saw the list before it was submitted for filling, either on October 18 or thereafter, and had the opportunity to include an order for large-size boots which would fit his own feet (R. 6, 11–12, 17). In any case, even if he first knew of the order when the

"boots, rubber, hip" were called for; neither this item nor the other items of wearing apparel specified the sizes to be furnished, but there is neither legal requirement nor custom that this be done (R. 6). Twelve pairs were ordered because experience indicated that number to be more than sufficient for the complement of the ship (R. 87–88, 89–90), and there is no intimation that a greater number was normally carried by other similar vessels (R. 11). The General Agent's representative uniformly understood that the supplier would furnish various sizes, ranging from six or seven to eleven or twelve (R. 90, 94, 95). The order was filled by the General Agent's usual New York supply house, under the personal supervision of the manager, who testified that it was his invariable custom, in the absence of detailed specification of sizes by the purchaser, to supply an assortment which consisted, in the case of an order for twelve pairs, of two 7's; three 8's; three 9's; two 10's; and two 11's (R. 6–7, 97–98, 104–105). Petitioner introduced other testimony that it was customary for slop chests to carry boots ranging from sizes six or seven to eleven and twelve, and sometimes fourteen (R. 120, 121, 122, 123).

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supplies were received, he made no effort to check the boot sizes, "and although he remained in the port of Savannah for several weeks before the ship sailed he made no effort to purchase a suitable size of boots on shore before sailing" (R. 12).

Unable to secure boots to fit him from the chest, the petitioner used his ordinary low-cut shoes to stand his watches on the bridge and to perform other tasks in very wet weather (R. 5). He had developed a cold almost immediately after sailing, which continued to grow worse, and he lost weight and sleep, and at times suffered a slight fever (R. 5, 34–36). He did not complain to the captain about his lack of boots or other adequate foot covering, nor request the captain's help in securing a pair (R. 5, 16), nor did he make more than haphazard efforts on the eastward voyage to borrow boots from either the merchant marine or the naval gun crews (R. 29, 33). He was unable to buy a pair of rubber boots in Liverpool (R. 5, 32), but in the middle of the return trip he did obtain a pair through the Naval Gunnery Officer on the ship (R. 5, 36). At no time did he wear the rubber coverall suit provided for each seaman, primarily for use in case the ship had to be abandoned (R. 16). His testimony was that the suit was heavy, burdensome and hampering to work, and that he understood the Master to disapprove its use aboard ship (R. 16, 44–45, 52–53, 110, 118–119, 124); the Master of the ship testified to the contrary (R. 70–71, 72, 118), and the District Court inclined to accept the latter's view (R. 16, 17).

At the conclusion of the voyage, petitioner was about to sign for another trip when he was found, in the course of a routine medical examination, to

be suffering from "minimal" tuberculosis (R. 3). This necessitated his hospitalization for over a year, after which he was discharged with instructions to report periodically for examination and with the advice that very probably within one year his health would be sufficiently restored to enable him to resume his occupation (R. 3). Before shipping on the *Milton J. Foreman,* petitioner's health was generally good, though he suffered from a bad cough, which he attributed to a sinus condition (R. 4). The Superintendent of the State Tuberculosis Sanitarium, at which petitioner was treated, testified that the tubercular condition was probably recent in origin (R. 63), and might very well have been caused by exposure and wet feet during the voyage, though the witness oscillated considerably in his opinion of the degree of causative connection between petitioner's wet feet and the disease—from "possible" to "reasonably possible" to "reasonably probable" (R. 13, 58–59, 59–61).

The District Court concluded that petitioner was barred from recovery for three separate reasons: (1) the United States had substantially complied with the requirements of the "slop chest" statute and therefore there was no breach of any obligation on its part; (2) even if the statutory requirement were breached, the petitioner was contributorily negligent; and (3) in any case, petitioner did not sustain his burden of proving that the disease was proximately caused by the

failure to supply him with rubber boots. Accordingly, petitioner's claim for damage was denied, and judgment was entered for him in the sum of $1,980, representing maintenance and cure for the year following his discharge from the sanitarium (R. 1–2, 19–20).

On appeal by petitioner, the judgment was affirmed. The Circuit Court of Appeals remarked that "the facts are fully and correctly stated, together with the principles of law properly applicable, in the opinion of the District Court," and adopted that opinion as its own (R. 128).

ARGUMENT

The holding of both lower courts that the United States complied with the statutory requirement governing slop chests is clearly correct, and conflicts neither with the applicable principles of maritime law nor with any prior decision. In addition, there is more than adequate support for the concurrent findings of the two courts below that petitioner was contributorily negligent and that his injuries were not proximately caused by the alleged breach of owner's obligation. Accordingly, under the governing rule, these findings do not warrant review by this Court.

1. The lower courts concluded that the United States, through its General Agent, reasonably and substantially complied with the slop chest requirements of 46 U. S. C. 670, by ordering, according to the general custom, twelve assorted pairs of

rubber boots, with the reasonable and confident expectation that the sizes would vary from six or seven to eleven or twelve, and this would suffice for the needs of the crew. Petitioner does not, and cannot, deny that respondent's agent exercised all reasonable care and diligence to provide a proper slop chest, nor can he assert that long-standing customary practice in this respect was not followed here. The claim must be that the statute imposes upon the vessel's owner an absolute obligation to have available in the slop chest a pair of rubber boots for each member of the crew,[2] and that even the most diligent owner is responsible for the consequences of failure to supply boots to any seaman who may happen to call for them (cf. R. 12). But such a construction, imposing absolute liability without fault, is obviously at war with the uniform practice under the statute, as evidenced by the instant testimony (R. 74, 87–88, 89–90, 98, 101–102), as well as with the Act's reasonable interpretation. As the District Court said, "it could not reasonably have been intended by Congress that merchant ships with their limited space other than for cargo, would be required to carry a large assortment of articles of clothing, sufficient at all times to supply any and every seaman with any and all articles of clothing which he might desire to purchase in

[2] The statute imposes a penalty of a fine, not exceeding $500, upon the owner, if the vessel is not provided with the required slop chest. *Supra*, p. 3.

every size suitable for any and every member of a crew of possibly fifty men" (R. 10).

The purpose of the statute, which is one of those "designed to secure the comfort and health of seamen aboard ship" (*Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 728), is to furnish a store at which seamen may purchase ordinary supplies and replenish normal clothing, at reasonable prices, during the voyage (cf. R. 10, 73, 82–83, 88, 91). The statutes do not compel the owner to supply the crew's clothing,[3] and the practice is for each seaman, especially an officer, to outfit himself (R. 88, 91). The full purpose of the requirement is therefore fulfilled by making available, as was done here, a sufficient number and an adequate assortment of clothing and miscellaneous articles, which could reasonably be expected to satisfy the crew's demands. To read the provision as holding the vessel absolutely responsible for filling all clothing requests, no matter how unusual the volume or unexpectable the demand, is needlessly to burden the owner and encumber the vessel, as well as to impose the severe penalty of liability without fault in a minor area in which the protection of the seaman does not require it. The "absolute duty" of providing a seaworthy vessel and appliances (*Seas Shipping Company,*

[3] With the exception that "every vessel bound on any foreign voyage exceeding in length fourteen days shall also be provided with at least one suit of woolen clothing for each seaman." R. S. 4572, 46 U. S. C. 669.

Inc. v. *Sieracki,* 328 U. S. 85, 94–95), which petitioner argues as analogy (Pet. 27–28), is obviously of a different order of significance, in view of the "hazards of marine service which unseaworthiness places on the men who perform it" (328 U. S. at 93) and the sailor's helplessness to discover or remedy such defects (cf. R. 19). Here petitioner as chief mate himself ordered the rubber boots for the slop chest (R. 6, 114).

2. Moreover, petitioner's contributory negligence was found by the lower courts to preclude recovery of "a very great proportion" of the damages to which he would be entitled on the unwarranted assumption that the United States had breached a duty owing to him (R. 17, 19). Petitioner's reply is that the slop chest provision is a "safety" statute, and that the Federal Employers Liability Act, as incorporated into the Jones Act, bars the defense of contributory negli-

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[4] The Jones Act, 46 U. S. C. 688, provides in part:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *."

The pertinent provision of the Federal Employers Liability Act, 45 U. S. C. 53, provides that the employee's contributory negligence—

"shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall

gence for injuries resulting from the violation of such enactments.[4] But the courts below correctly held that 46 U. S. C. 670 is primarily designed for the seaman's convenience, comfort, and pecuniary protection, rather than a "statute enacted for the *safety* of employees." The mark of a true safety statute is that its violation can be expected to result in bodily injury; but it is only the unique case in which breach of the slop chest requirement would lead to actual disability, rather than to inconvenience or discomfort.[5]

3. Finally, disposition of the case is controlled by the concurrent factual findings of both lower courts that, in any event, petitioner did not sustain the burden of proving that his disease was proximately caused by the respondent's alleged breach. The District Court carefully considered the inconclusive testimony of petitioner's expert witness, as well as the general knowledge in the field, and concluded that the petitioner had not

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be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

[5] In this respect, the instant statute differs markedly from the "warm room" statute (46 U. S. C. 669), requiring "every vessel in the foreign or domestic trade" to "provide a safe and warm room for the use of seamen in cold weather," and which has been held to be a "safety" statute. *Rooker* v. *Alaska Steamship Company*, 185 Wash. 71, certiorari denied, 299 U. S. 552. In addition to the difference in subject matter, the origin of the two statutes is dissimilar, as the District Court points out (R. 9, 17–18).

"convincingly shown that his tuberculosis was proximately caused by getting wet feet due to not having rubber boots" (R. 15), within the rule that proof of causation must be more than conjectural. *Cortes* v. *Baltimore Insular Line,* 66 F. 2d 526, 528 (C. C. A. 2); *Miller* v. *Lykes Bros.-Ripley S. S. Co.,* 98 F. 2d 185, 186 (C. C. A. 5), certiorari denied, 305 U. S. 641; *Rey* v. *Colonial Nav. Co.,* 116 F. 2d 580, 583 (C. C. A. 2). The trial judge's findings and discussion were adopted by the Circuit Court of Appeals. Review of such concurrent findings of fact is not merited. *Mahnich* v. *Southern Steamship Co.,* 321 U. S. 96, 98–99; *Just* v. *Chambers,* 312 U. S. 383, 385.

CONCLUSION

The findings and decision of the two lower courts are correct, and there is no conflict. The case turns upon a narrow factual issue of proximate cause. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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